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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

JOHN E. BUSER, JR., by his next friends,

JOHN E. and VIRGINIA BUSER,

Petitioners,

v.

CORPUS CHRISTI INDEPENDENT SCHOOL DISTRICT

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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180 pp

QUESTIONS PRESENTED

1. Whether a school district commits *per se* violations of the Individuals with Disabilities Education Act ("Act") when it prevents the parents from having meaningful input into the Individualized Education Program ("IEP") by failing to notify them of 15 out of 27 IEP meetings, never incorporating parental requests in the IEP, and making it appear by improper voting that disagreement with the school district's version of the IEP was futile.

2. Whether a school district commits *per se* violations of the Act by omitting Congressionally mandated "short-term instructional objectives" from the IEP.

3. Whether this case is moot, because of petitioner's current ineligibility for public school because of his age, in spite of the fact that the relief which he seeks is in the form of

compensatory education in a work environment, not back in the school room subject to the Act.

LIST OF ALL PARTIES TO THE PROCEEDING

All parties to the proceeding appear in the caption of the case.

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Petitioners herein respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth

Circuit entered in this action on April 21, 1995. [References to the record of the administrative hearing in this petition will be (Ad.R.__). References to the record in the district court will be (R.__).]

OPINIONS BELOW

The opinion of the court of appeals (App. A, 1-15) is reported at 51 F.3d 490. The decision (App. C, 1-43) and judgment of the district court (App. D, 1) are unreported.

BASIS FOR JURISDICTION

The judgment of the court of appeals was entered on April 21, 1995. A timely petition for rehearing was denied on May 19, 1995. (App. B, 1-3). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES, REGULATIONS AND INTERPRETATIONS INVOLVED

The statutes, regulations, and

interpretations involved are portions of the Individuals with Disabilities Education Act [20 U.S.C. §§ 1401 (App. F), and 1415 (App. G)] (hereafter called the "Act"), the regulations thereunder [34 C.F.R. §§ 300.343 (App. H), 300.345 (App.I), and 300.346 (App. J)], and some interpretations of those regulations by the Office of Special Education and Rehabilitation Services of the Department of Education (34 C.F.R. Ch. III, Part 300, App. C, Questions 26 (App. J), 33 (App. K), 34 (App. K,1-2), 39 (App. L), and 43 (App. M). (Hereafter referred to simply as "Question ___.")

STATEMENT OF THE CASE

This case concerns the rights of a disabled child under the Act to have meaningful input of his parents into his Individualized Education Program ("IEP"), and whether the resulting IEPs contained an important component specified by Congress,

the "short-term instructional objective".

Petitioner, John E. Buser, Jr., ("John") was a handicapped student in the Corpus Christi Independent School District ("CCISD") from 1978, when the Act first required IEPs, until his twenty-second birthday in 1986. (R.625). CCISD conducted 27 meetings for the purpose of developing, reviewing or revising John's IEP between 1978 and 1984. [Ad.R.1244, 1136, 756, 740, 1123, 717, 773, 825, 980, 855, 1159, 1238 (three meetings), 1231 (four meetings), 1223 (three meetings), 1214 (three meetings), 1205 (three meetings)]. These meetings are called "IEP meetings".[1] 34

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[1] CCISD's terminology for what the federal regulatory interpretations call "IEP meetings" [e.g., see 34 C.F.R. Ch. III, Pt 300, App. C. Questions 26 (App.J), 33, (App.K-1), 34, (App.K-1-2) and 43 (App.M)] is "ARD meetings" (Admission, Review and Dismissal). Petitioners chose to use the terminology of the federal interpretations; the court below chose to use the "ARD"

C.F.R. Ch. III, Pt 300, App. C, Questions 26 (App. J), 33 (App. K), 34 (App. K, 1-2), and 43 (App. M). CCISD gave John's parents prior written notice of twelve of these meetings which they attended, and failed to give them notice of fifteen which they did not attend. (Ad.R.682-3).

At the IEP meetings of which they received notice:

1. John's father testified without contradiction by CCISD that the written recommendations he and John's mother brought to the meetings were generally never incorporated in the IEPs (R.683-4); and CCISD did not point out a single parental recommendation that had ever been incorporated

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terminology of CCISD. Petitioners will continue to use the federal "IEP meeting" terminology, since "ARD meeting" is nowhere to be found in the federal law.

into John's IEP.

2. Opposition to the IEPs appeared futile to the Busers because open votes were taken at the end of the meetings and the CCISD employees attending always out-voted the Busers and always voted for the IEP which they brought to the meeting and which never included the Busers' input. (R.684-6).

The Act requires that the IEP developed at these meetings be a written statement [20 U.S.C. § 1401(a)(20)] containing, *inter alia*, "short-term instructional objectives." 20 U.S.C. § 1401(a)(20)(B) (App. F). The district court held that no "time frame" - no "short-term" of the "Short-term instructional objectives" is required. (App. C, 27-28). The Fifth Circuit

affirmed. (App. A, 15). The record fails to show any "short-term" for the instructional objectives even outside of the written IEPs. CCISD's own handbook on preparation of IEPs shows the "short-term"- a beginning and ending date for each short-term objective - stated in the IEP. (R.594).

The jurisdiction of the court of first instance, the district court, was based on 28 U.S.C. § 1331 and 20 U.S.C. § 1415(e)(2). (App.G).

REASONS FOR GRANTING THE WRIT

The Court should grant this petition for writ of certiorari because it involves the construction of the Individuals with Disabilities Education Act ("Act"), 20 U.S.C. § 1400 et seq., the statute which sets forth the Congressional plan for assisting the states in educating more than eight million disabled school children

throughout the nation. *Board of Educ. v. Rowley*, 458 U.S. 176, 195 (1982). More particularly it involves questions of how the Individualized Education Program (IEP) required under the Act is developed for each disabled student. In *Honig v. Doe*, 484 U.S. 305, 311 (1988), this Court called the IEP the centerpiece of the Act. It went on to say, " . . . Congress repeatedly emphasized throughout the Act the importance and indeed the necessity of parental participation in both the development of the IEP and any subsequent assessments of its effectiveness. [Citations omitted.] Accordingly the Act establishes various procedural safeguards that guarantee parents both an opportunity for meaningful input into all decisions affecting their child's education and the right to seek review of any decisions they think inappropriate." The case at bar

involves procedures of the school district which prevented "meaningful input" into the IEP by the parents, and failure of the district to' include a Congressionally mandated and educationally important component in the IEP, "short-term instructional objectives." 20 U.S.C. § 1401(a)(19)(B). It involves lack of mandated notification to the parents of most of the meetings at which the IEP's were reviewed and frequently changed. 20 U.S.C. § 1415(b)(1)(C) (App. G); 34 C.F.R. § 300.345(a) (App. I); 34 C.F.R. Ch. III, Pt 300, App. C, Question 43 (App. M).

The obligations placed on the States (and their school districts) under the Act are largely procedural, but that procedure includes the development of an IEP that conforms with the requirements of § 1401(a)(19). *Board of Educ. v. Rowley*, 458 U.S. 176, 207-208, footnote 27 (1982).

(Through amendment the subsection of the Act defining and setting out the components of the IEP has been changed from (19) to (20).) There is a question here of whether the IEP complied with § 1401(a)(20). (App. F). The Act, then called the Education for All Handicapped Children Act, was first passed in 1975, and this Court has never interpreted its provisions relating to the centerpiece of the Act, the IEP. It is time to give the parents, the school districts, the States, and the Office of Special Education guidance on the formulation and substance of the IEP.

1. The decision of the court below that school districts do not need to give parents written notice of all meetings at which the IEP is reviewed or changed, is predicated upon a major misunderstanding of the Act.

First, it incorrectly assumes that the

statutory and regulatory scheme provides for annual meetings concerning the IEP which have great significance, and optional intervening meetings concerning the IEP which are of less, if any, significance. The court below called these latter, "staff meetings". (App. A, 9). It inferentially conceded that the Busers were not notified of these meetings, that they were for the purpose of evaluating John's progress under the IEP, and modifying or discontinuing the objectives stated in the IEP, yet it erroneously held that there had been ". . . no failures on the part of CCISD to meet the procedural requirements mandated by the Act." (App. A, 11). It explained this in footnote 5 (App.A-5) arguing that discontinuing an objective as "mastered" is not a change in the IEP - a patent absurdity, since it would allow the potential for the discontinuance of all the

objectives during the year without the creation of new ones, leaving the IEP consisting of the student doing nothing - all without parental input. The holding also conflicts with Question 43 (App. M) which states that changes in short-term instructional objectives cannot be made without initiating another IEP meeting with notice to the parents. However, for purposes of deciding whether the parents were entitled to notice of the meeting, and whether the meeting was an "IEP meeting", it is not necessary to decide whether the IEP was changed by dropping short-term instructional objectives, since mere *review* of the IEP triggers the notice requirement. 34 C.F.R. § 300.343(a) and (d) (App. H) and Question 43 (App. M). The court below erroneously believed that for a meeting concerning the IEP to be one requiring notice to the parents, it must be an

"annual ARD meeting" or one at which the IEP is "changed", as contrasted to "reviewed" or "assessed". (App.A,11-13). This is contrary to *Honig v. Doe,* 484 U.S. 305, 311 (1988) [". . . Congress repeatedly emphasized throughout the Act the importance and indeed the necessity of parental participation in both the development of the IEP and any ***subsequent assessments of its effectiveness***." (Emphasis added.)] As stated above, the holding of the court below is also contrary to 34 C.F.R. § 300.343(a) and (d), the latter subsection stating: "Each public agency shall initiate and conduct meetings to *review* each child's IEP periodically and, if appropriate, revise its provisions. A meeting must be held for this purpose at least once a year." (Emphasis added.)[2] In

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[2] This latter requirement of an IEP meeting

conjunction with this is: "§ 300.345 **Parent participation.** (a) Each public agency shall take steps to ensure that one or both of the parents of the child with a disability are present at each meeting or are afforded the opportunity to participate, including - (1) Notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; . . ." (App. I).

The principal of John's school admitted that the Busers were never notified until the last year of many meetings at which the IEPs were reviewed and often changed by deleting objectives.

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at least annually is apparently the source of the misconception that there is an "Annual IEP Meeting". Of course it does not say that and in no way creates a hierarchy in which "the" annual meeting is of greater significance than any other IEP meeting. For elucidation of this see the note following § 300.343. (App.H).

(Ad.R.661-662). The court below completely ignored this testimony.

The court below erroneously stated that " . . . the Busers approved every IEP developed for their son until the 1985-86 school term." This mis-statement is again predicated on the court's mistaken belief that there is an "annual" IEP meeting at which the IEP is created, and others during the year which are insignificant. As can be reasoned from the discussion in the note following § 300.343 (App.H), the only time an IEP is created for a student is when he first becomes eligible for services under the Act; everything after that is a modification of that initial IEP. The Act, the regulations and interpretations do not recognize any later IEP meetings as being more significant than any others. They only provide that you have at least one IEP meeting annually for the purpose of review.

§300.343(d). (App.H). Since the Busers were not notified of all 15 of the IEP meetings (what CCISD called 90 day IEP meetings) before the 1984-85 school year, and since there were only six IEP meetings (1978-83) of which they were notified, most of the time John was being schooled under an IEP which was reviewed and revised at a meeting of which the Busers had not received notice and did not attend.

The Fifth Circuit recognizes that a school's failure to meet the Act's procedural requirements may alone warrant finding that, as a matter of law, the school has failed to provide a free appropriate public education. *Jackson v. Franklin County School Bd.*, 806 F.2d 623, 629 (5th Cir.1986). *Jackson* cited by the court below, but distinguished on the specious basis that none of John's short-term objectives in his IEP were changed

without notice to the parents. (App. A, 11). As discussed above, if a meeting was called by CCISD to review and assess the effectiveness of the IEP, no change in the IEP was necessary to trigger the parental notice requirement. Also no claim has been made by the Busers that the short-term objectives were changed; the claim was that the IEP was changed by dropping objectives on the basis that they had been achieved. Logically, as well as legally, the decisions on these questions need parental input, achieved only through notice to them of the meetings.

The court below further shows its misunderstanding of this case by saying that the Busers failed to present any evidence that CCISD actually terminated their son's IEPs. (App.A, 11). No claim has ever been made that the whole IEP was terminated. From a reading of footnote 5,

it appears that the court meant to say "objectives" when it said "IEP" in that sentence. But again the court's understanding of the Act is shown to be deficient by its holding that objectives can be dropped from the IEP without a meeting held with parental notice. Petitioners have above cited 34 C.F.R. Ch. III, Pt 300, App. C, Question 43 (App.M) for the proposition that short-term instructional objectives cannot be changed without an IEP meeting with notice to the parents. These interpretations of the Act, promulgated in question and answer form by the Office of Special Education and Rehabilitative Services of the Department of Education are contained in 34 C.F.R., Part 300, Appendix C. They are very informative on several issues in this case and are attached hereto as Appendices J through M.

They must be given controlling weight unless they are plainly erroneous or violative of the Constitution, the Act, or the regulations. None of these exceptions is applicable here, and therefore Question 43 and others cited herein are controlling. *Stinson v. United States*, ___ U.S. ___ , 113 S.Ct. 1913, 1919, 123 L.Ed.2d 598 (1993); *Robertson v. Methow Valley Citizens' Council*, 490 U.S. 332, 359 (1989). Even though cited by petitioner, the court below ignored these interpretations with devastating effect on its opinion.

The court below referred to (App.A, 10), but did not rationally deal with, the Busers' contention that the IEP meetings they attended were conducted in such a way that they were led to believe that they would have no impact in the development of their son's IEPs, and that any disagreement

they might have with the IEPs would be futile. (Ad.R.683-686). Inexplicably the court never dealt with this contention except by ignoring it and holding, without rationale, that the Busers were given the opportunity to participate in the development of the new IEP. (App.A, 12).

John's father testified that the written suggestions of his wife and him for the IEP were generally not put in the IEP (Ad.R.683-684), and CCISD failed to introduce evidence of one single instance where it had included a request by the Busers in the IEP. The only request that the Busers thought had been included in the IEP was disputed by CCISD and held by the district court to constitute no part of the IEP. (App.C, 31-33).

Neither did CCISD dispute John's father's testimony that votes were taken at the IEP meetings they attended which were

taken with his wife and him voting last so that it appeared to him that CCISD was "trying to railroad it through." (Ad.R.686). Furthermore CCISD never attempted to explain away John's father's testimony that, when it came time for him to vote on the IEP after five or six CCISD personnel had voted for it, it appeared to him that he had no effective voice. Question 26 (App.J) states that the parents are expected to be equal participants with school personnel at the IEP meetings in developing, reviewing, and revising the child's IEP. No provision is made in the Act, the regulations or the interpretations for voting on the IEP, yet CCISD conducted the meetings with the voting technique described above, preventing John's parents from being equal participants.

In conclusion, the lack of notice to the Busers of 15 IEP meetings, the

"railroading" of the IEPs through the IEP meetings of which the Busers did receive notice and the repeated failure of CCISD to ever include parental ideas in the IEPs constituted serious violations of the Act which should be held *per se* actionable without proof of specific injury.

Board of Educ. v. Rowley, 458 U.S. 176, 207-208, footnote 27 (1982) gives a twofold inquiry for testing whether a school district has complied with its obligations in suits of this sort, and one of these is whether the procedures of the Act have been complied with. There is no indication in its statement of the rule that *Rowley* intended there to be an additional element whereby the student had to prove injury from failures to follow the procedures of the Act, and none should be engrafted now.

2. Petitioners have contended, and

continue to contend, that John's IEPs were fatally flawed because they did not contain "short-term instructional objectives" as mandated by the Act. 20 U.S.C. § 1401 (App.F). Yes, they contained objectives, but they were not short-term instructional objectives because no short-term was stated in the IEPs. Since an IEP is by definition a written instrument, 20 U.S.C. 1401(a)(20), it is illogical to contend that an IEP can have components that are not stated in it. To so argue violates the concept of the IEP as a written document. Certainly it can be argued that no written document is needed for teachers; that they can get along fine with oral conferences and oral decisions about how the student is to be taught. But this is not the concept that Congress adopted when it created the Act. Congress adopted, and certainly with good reason, a concept of having a written

educational program for each handicapped student - the IEP. The Office of Special Education has correctly ruled that short-term instructional objectives in an IEP are used to describe what a given child is expected to accomplish in a particular area within a "specified" time period. Question 39 (App. L). The district court impliedly acknowledged that the IEPs did not have short-terms for the objectives stated in the IEP in ruling that there is no need for a time frame at all. (App.C, 27-28),

Until writing this petition, petitioners had believed that the district court had said that a short term for each objective was necessary, but that it could be proved by evidence of orally agreed, or written, short terms outside the four corners of the IEP. Since there was no evidence in the record of such oral or written short terms for the objectives

outside of the IEP, petitioner believed that this was a fatal flaw in the district court's reasoning. However, petitioners' current reading of the district court's decision shows that it held that ". . . time frames are not required by the IDEA." In other words, it held that time frames, or, rather, short terms, are not required either inside or outside of the IEP, a position with no support in the Act, regulations or interpretations. 20 U.S.C. § 1401(a)(20)(B) (App.F); 34 C.F.R. § 300.346(a)(2) (App.I); Question 39 (App.L).

Also, both the district court and the Fifth Circuit ignored the fact that CCISD's own instructions for how to prepare IEPs showed the short-term of the objective in the IEP. (Ad.R.407-408).

This case presents a golden opportunity for this Court to speak definitively on this crucial part - this

building block - of the IEP, the centerpiece of the Act, and uphold the clearly expressed Congressional intention that the IEP be written and that it specify the short term of the "short-term instructional objectives." This Court should disapprove the unjustified district court concept (App. C, 27-28), affirmed by the Fifth Circuit, that no time frames are required for short-term instructional objectives.

3. This case is not moot because the relief sought by petitioners is still available, contrary to the situation in *Honig v. Doe,* 484 U.S. 305, 311 (1988) where the lower court's remedy involved the student being sent back to public school when he was overage and therefore not subject to the Act. In the case at bar, the remedy being sought is compensatory education outside the public school

context.

The district court properly overruled a plea of mootness by CCISD (App. E, 1-6), and that ruling is not now before this Court.

However, because under Article III of the Constitution this Court may only adjudicate actual, ongoing controversies, *Honig v. Doe,* 484 U.S. 305, 311 (1988), and since John is now 31 years old (R.625), petitioners are addressing that question. The *Honig* holding of mootness is distinguishable because of the different sort of relief being sought there and in the case at bar. To understand this it is necessary to look at the district court's ORDER AND PERMANENT INJUNCTION in *Honig*. (In the district court, *Honig* was styled *John Doe, Plaintiff, Jack Smith, Plaintiff-Intervenor v. Bill Maher, et al., Defendants.* See the district court's ORDER

copied verbatim as APPENDIX B to the Ninth Circuit opinion, *Doe by Gonzales v. Maher*, 793 F.2d 1470, 1499 (9th Cir.1986), from which the appeal was taken to this Court in the case called *Honig v. Doe*.)

The case at bar is still alive because in it petitioners are not seeking to currently or prospectively enforce the application of the Act to CCISD's provision of educational services to John. The remedy petitioners are seeking is simply compensatory education in the form of two years of vocational on-the-job training for John. The Act would not apply to the provision of such compensatory education, because John is now over 21 and application of the Act stops when you pass your 21st birthday. 20 U.S.C. § 1412(2)(B). If petitioners are held to be entitled to the compensatory vocational on-the-job training for John which they seek, petitioners would

not be entitled, *with respect to that compensatory education*, to any further protection of the Act. For example, during the provision of such compensatory education, the Act would not require that John have an IEP. It would no longer require that the IEP be reviewed at least annually. It would no longer require anything, because as to the educational services being provided to John, the provision of those services would not be controlled by the Act, but by the terms of the judgment of the court ordering compensatory education in the form of vocational on-the-job training.

This does not mean however that CCISD cannot be held accountable for past violations of the Act which occurred while John was under 22, and ordered now to provide compensatory education (which compensatory education would not itself be

governed by the Act).

This is contrasted to the judgment of the district court in *Honig*. That judgment did not order compensatory education; it ordered compliance with various specific requirements of the Act with respect to the provision of future educational services to those plaintiffs. Obviously the case was mooted as to the over 21 plaintiff because he was no longer going to be in school receiving educational services. The case at bar would be analogous if petitioners were seeking an order that CCISD provide an IEP and annual review thereof under the terms of the Act with respect to the compensatory education they are seeking for John.

This case is live and not moot, because the relief sought by petitioners could be implemented; it would not be futile. It would not be like declaring

plaintiffs eligible voters after the election has already taken place, as was true in *Mills v. Green,* 159 U.S. 651 (1895), cited by Chief Justice Rehnquist in his concurring opinion in *Honig* at 484 U.S. 330, or like *Honig* with respect to the over 21 plaintiff who was going to receive no more schooling because of his age. What good would it do for a court to order IEP meetings if he wasn't going to be a student?

A very practical problem is created if this case is held moot. As the Court noted in *Honig* at 484 U.S. 322, that case took seven years to reach this Court, and in the case at bar the case has taken nine years. To hold that the courts are powerless to remedy violations of the Act occurring before the student becomes 22 by ordering compensatory education (uncontrolled by the Act, but controlled by the court order) for

him after he becomes 22, would tend to mean that handicapped students who were 13 to 15 years of age would be without a remedy for violations of the Act because school districts could always moot their cases by taking them on appeal. We are not saying that would always happen, but it should not be overlooked as an important factor. In this regard, also consider one of the leading cases regarding compensatory education, *Meiner v. State of Mo.*, 800 F.2d 749 (8th Cir.1986). That case refers to the fact that the plaintiff was 14 years old in 1976 (800 F.2d at 751). Consequently she was 24 in 1986 at the time of the 8th Circuit appeal cited above in which compensatory education was held to be a proper remedy. It is true that the "22 year old and over have no remedy" argument was not discussed in that case, but that was most likely because it appeared to all

concerned to be specious. *Honig* could not *hold* that relief could not be granted after the age of 21. All it could hold under its facts was that, as to the 24 year old John Doe, the particular relief granted by the district court had been rendered meaningless - mooted - by the passage of time. It did not, and could not under its facts, hold (as contrasted to stating dictum) that, if the district court had granted relief not subject to the Act, such as vocational compensatory education outside the school setting and outside the controls of the Act, such relief was either impermissible or mooted. (But it must be noted that if compensatory education for the 24 year old emotionally disturbed John Doe of *Honig* meant placing him in a classroom with normal 16 and 17 year olds, that might have been an inappropriate remedy, regardless of the mootness

question. However, that sort of situation would not be created by the relief sought by petitioners in the case at bar, since it would be in a work, not a school setting.)

Admission of Fact No. 6 of the Standard Joint Pre-Trial Order, appproved by signature of both counsel, established that John's parents would see to it that John took advantage of compensatory education if ordered by the district court. (R.373). This makes it clear that petitioners have such a ". . . personal stake in the outcome . . ." of this case that there is an assurance of the ". . . concrete adverseness which sharpens the presentation of issues" as is required by *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983). Admission of Fact No. 6 also renders irrelevant the discussions of the dissent in *Honig* concerning whether the unmooted plaintiff there would seek

additional educational services, if he were found entitled to them. *Honig*, 484 U.S. 337-338.

Furthermore the question of the likelihood of repetition of the violation is irrelevant here since petitioners are not seeking injunctive relief against further violations. All that they contend is that there have been past violations, and that they are entitled to relief. They agree that there can be no future violations with respect to John because he is now too old to be subject to the Act.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS FOR THE

FIFTH CIRCUIT

U.S. Court of Appeals
FILED
APR 14, 1994

Charles R. Fulbruge
III, Clerk

NO. 94-60055

JOHN E. BUSER, JR., by his next friend, JOHN E. and VIRGINIA BUSER,
Plaintiff-Appellant,

versus

CORPUS CHRISTI INDEPENDENT SCHOOL DISTRICT
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Texas

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Before KING, BENAVIDES, Circuit Judges, and LAKE*, District Judge.

FORTUNATO P. BENAVIDES, Circuit Judge;

Plaintiff-Appellant appeals the district court's judgment in favor of Defendant-Appellee, finding that Defendant

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* District Judge of the Southern District of Texas, sitting by designation.

Defendant-Appellee, finding that Defendant-Appellee complied with the procedure mandates of the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400, *et seq.*, and acted in good faith in developing and implementing Plaintiff-Appellant's individualized educational programs. We affirm.

I.

John E. Buser, Jr., an autistic twenty-nine year old man, was enrolled in Corpus Christi Independent School District ("CCISD") through the 1985-86 school year. His parents, Dr. John E. Buser, Sr. and Virginia Buser ("the Buser's"), actively participated in Admission, Review and Dismissal ("ARD") committee meetings. In these meetings committee members and parents participated in developing individualized educational programs

("IEPs") for students with disabilities.[1] Through the 1984 school year, the Busers approved the IEPs developed for their son in the ARD meetings they attended. However, in a meeting conducted in September 1985, the Busers indicated that they both agreed and disagreed with a proposed IEP. Then at the April 1986 meeting, the Busers disagreed with ARD committee's recommendations.

Thereafter in May 1986, the Busers requested a due process hearing before the Texas Education Agency, claiming that CCISD failed to provide free appropriate public education under the IDEA and seeking compensatory special education for their son. A hearing was held before the Special Education Officer, who concluded that because John E. Buser, Jr. reached the age

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[1] 34 C.F.R. § 300.343.

of twenty-two prior to the date of the hearing, he had exceeded the age of eligibility for services under the Act.[2]

On July 1, 1987, the Busers filed suit as next friends for their son in federal district court against CCISD. The district court determined that compensatory education is an equitable remedy that is not foreclosed by a student reaching twenty-two years of age, and remanded the case to the Texas Educational Agency for a decision on the merits. Upon remand, the Special Education Officer concluded that the IEP developed by CCISD for John E. Buser, Jr. met the standards for free appropriate public education under the IDEA.

The case was reinstated to the district court, where the parties agreed to

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[2] 20 U.S.C. § 1412 (2) (B)

submit the case to the court based on the record developed before the Special Education Officer with the Texas Education Agency. After reviewing the administrative record, stipulations of the parties and the pleadings, the court found that CCISD complied with the procedural mandates of the IDEA, that the John E. Buser, Jr.'s individual education programs were designed to provide him some educational benefit and that he did receive some educational benefit while attending CCISD. On January 10, 1994, the district court entered a final judgment in favor of CCISD.

II.

A district court's review of the Special Hearing Officer's decision requires a two-part inquiry. First, the district court must decide whether the state, through its local education agency or intermediate educational unit, has complied

with the procedures set forth in the IDEA. *Board of Education, etc. v. Rowley*, 458 U.S. 176, 206-07, 102 S.Ct. 3034, 3051, 73 L.Ed.2d 690 (1982). Second, the court must determine whether the IEP developed for the disabled child is "reasonably calculated to enable the child to receive educational benefits". *Id.*

Because the Busers only appeal the districts court's decision that CCISD complied with the procedural mandates of the IDEA, our review of this mixed question of law and fact is *de novo*. *Teague Indep. School Dist. v. Todd L.*, 999 F.2d 127, 131 (5th Cir. 1993). Our review of the court's findings of underlying facts is for clear error. *Id.*

III.

Under the IDEA, states are required to provide handicapped children "free appropriate public education". 20 U.S.C. §§

1400 (c) and 1412 (1). In order to ensure a handicapped child's right to free appropriate public education, the Act mandates that an IEP be developed for each child. An IEP is a written statement created in a meeting by a representative of the local education agency or an intermediate educational unit. 20 U.S.C. § 1401 (a)(20). The IEP must include a statement (1) of the present levels of educational performance of the child, (2) of the annual goals, including short-tern instructional objectives, (3) specific educational services to be provided, (4) projected date for initiation and anticipated duration of services, and (5) evaluation procedures. *Id.*

The IDEA also imposes extensive procedural requirements designed to "guarantee parents both an opportunity for meaningful input into all decisions

affecting their child's education and the right to seek review of any decision they think inappropriate". *Hoing (sic) v. Doe*, 484 U.S. 305, 311-12, 108 S.Ct. 592, 598, 98 L.Ed.2d 686 (1987). These procedures include: (1) an opportunity for the parents to examine all the child's records and to obtain an independent educational evaluation of the child; (2) written prior notice to the parents whenever the local education agency or intermediate educational unit proposes or refuses to initiate or change the "identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to such child"; and (3) an opportunity for parents to present complaints to the agency or educational unit, including the opportunity for an due process hearing before the state or local educational agency. 20 U.S.C. §

1415(b)(1)(A), (C), (E), and (2). "Adequate compliance" with the procedures will, in most cases, assure the disabled child's substantive right to free appropriate public education has been met. *Rowley*, U.S. at 206, 102 S.Ct. at 3050.

The Busers allege that CCISD violated the procedural requirements enumerated under the IDEA. Specifically, they contend that they did not receive notice, nor were they invited to attend, up to fifteen staff meetings at which their son's progress under his IEP was evaluated. The Busers further contend that at these meetings some of their son's short-term objectives were discontinued or modified. They argue that CCISD's failure to notify them of these meetings at which the school officials discussed their son's progress in achieving short-term objectives constitutes a *per se* violation of the IDEA because the short-

term objectives listed in their son's IEP's were "changed", as defined in 20 U.S.C. § 1415 (b)(1)(C), by either being discontinued or modified.

The Busers also contend that CCISD did not inform them that they were equal participants in the participation and revisions of their son's IEPs as required under the IDEA.[3] They argue that the ARD meetings they attended were conducted in such a way that they were led to believe that they would have no impact in the development of their son's IEPs would be futile.

We have previously held that a school's failure to meet the IDEA's procedural requirements may alone warrant finding that, as a matter of law, the

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[3] *See* 34 C.F.R. § 300 app. C at questions 26, 35, and 55.

appropriate public education. *Jackson v. Franklin County School Bd.*, 806 F.2d 623, 629 (5th Cir. 1986). However, under the facts of this case, we can find no failures on the part of CCISD to meet the procedural requirements mandated by the Act. The district court was not persuaded that John E. Buser, Jr's short-term objectives in his IEPs were "changed" without notice to his parents, and neither are we.[4] The Busers failed to present any evidence that CCISD actually terminated their son's IEPs.[5]

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[4] The district court also found that if any of John E. Buser, Jr.'s short-term objectives were terminated, any injury caused could only be *de minimis*. *See Weil v. Board of Elementary & Secondary Education*, 931 F.2d 1069, 1072 (5th Cir.), *cert. denied*, 502 U.S. 910, 112 S.Ct. 306, 116 L.Ed.2d 249 (1991). Because we find that CCISD did not violate any of the procedural requirements under the IDEA, we decline to address the issue of when such a violation is only *de minimis*.

[5] The evidence in the record indicates that short-term objectives were

actually terminated their son's IEPs.[5] Additionally, the Busers approved every IEP developed for their son until the 1985-86 school term. They were notified of the annual ARD meetings, where they were given the opportunity to compare previous IEPs with the new proposed IEP and to participate in the development of the new IEP.[6] An evaluation or recognition of the

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[5] The evidence in the record indicates that short-term objectives were "discontinued" when they were mastered by John E. Buser, Jr. Mastering a short-term objective is not a "change" under 20 U.S.C. § 1415 (b)(1)(C), but merely constitutes the completion of a listed objective in the IEP. The successful completion of a short-term objective is a necessary step in the implementation of the IEP if the annual goal is to be achieved.

[6] *See* 34 C.F.R. § 300 app. C. Appendix C, entitled "Notice of Interpretation," addresses how the IDEA is to be implemented by the states through a question and answer format. Question ten discuss how often meetings must be held and provides, "Section 614

short-term objectives contained in the IEP is contemplated and essential to carry out the IEP itself. We see no change or modification requiring notice in CCISD carrying out the provisions of an IEP that was instituted with notice to and input from John E. Buser, Jr.'s parents. Moreover, any short-term objectives that may have been improperly marked as discontinued or modified could have been discovered at these annual meetings.[7]

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clear that there should be as many meetings a year as any child may need."

[7] Requiring CCISD to notify the Busers every time an informal meeting takes place where John E. Buser, Jr.'s progress is discussed between his teacher and a school administrator would prove extremely ineffective in the administration of John E. Buser, Jr.'s educational development. Rather than enhance his right to free appropriate public education, the interpretation urged by the Busers would hamper the efforts of CCISD to provide John E. Buser, Jr. with an appropriate education and the achievement of the goals set forth in his IEP.

Because the Busers did receive notice of the annual ARD meetings, and did participate in those meetings, we find that CCISD "adequately complied" with the notice requirements under the Act, thereby assuring that John E. Buser, Jr.'s substantive right to free appropriate public education was met. *See Rowley,* 458 U.S. at 206, 102 S.Ct. at 3050.

Neither can we find evidence that the Busers were barred from participating in the development of their son's IEP throughout his many years in CCISD. The Busers have not presented any evidence that their son's IEPs were not reasonably calculated to enable him to receive some

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enhance his right to free appropriate public education, the interpretation urged by the Busers would hamper the efforts of CCISD to provide John E. Buser, Jr. with an appropriate education and the achievement of the goals set forth in his IEP.

provided the Busers numerous opportunities to participate in the educational development of their son, and that the Busers did actively participate in their son's special education program. Therefore, we conclude that CCISD provided the Busers equal opportunity to participate in the development of their son's IEP in compliance with the procedural requirement under the IDEA.[8]

IV.

For the reasons articulated above, the judgment of the district court is AFFIRMED.

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[8] We decline to address the remaining issues raised on appeal because our disposition of the issues addressed above render the remaining issues unnecessary for the proper determination of this appeal or without merit.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

U.S. COURT OF
OF APPEALS

No. 94-60055

FILED
MAY 19, 1995
CHARLES R.
FULBRUGE, III
CLERK

JOHN E. BUSER, JR., by his next friends, JOHN E. and

VIRGINIA BUSER,
Plaintiff-Appellant,

versus

CORPUS CHRISTI INDEPENDENT SCHOOL,
Defendant-Appellee

Appeal from the United States District Court for the Southern District of Texas

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC
(Opinion 4-21-95, 5 Cir., _____, _____F.3d_____)

(May 19, 1995)

Before KING and BENAVIDES, Circuit Judges

and LAKE,[1] District Judge.

[1] District Judge of the Southern District of Texas, sitting by designation.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

/s/ Fortunato P. Benavides
United States Circuit Judge

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Fortunato P. Benavides
United States Circuit Judge

Clerk's Note: See Frap and Local Rules 41 for stay of the mandate.

REHG-4
Rev.1/4/95

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

JOHN E. BUSER, JR.
by his next friends
JOHN E. AND VIRGINIA BUSER

VS.

CORPUS CHRISTI INDEPENDENT SCHOOL DISTRICT

§ UNITED STATES
§ DISTRICT COURT
§ SOUTHERN DISTRICT OF
§ TEXAS
§ ENTERED
§ JAN 18 1994
§ Michael N. Milby,
§ Clerk by Deputy:

C.A. NO. C-87-114

DECISION OF THE COURT

Plaintiff sued defendant under the Individuals with Disabilities Education Act ("IDEA"),[1] 20 U.S.C. § 1400, et seq., alleging that defendant Corpus Christi Independent School District ("CCISD") failed to provide plaintiff with a "free appropriate public education". In particular, plaintiff alleges that his individualized education programs ("IEPs") were inadequate because they failed to contain short-term objectives and were too

[1] At the time plaintiff filed suit, the statute was named the Education for the Handicapped Act ("EHA").

repetitive from year-to-year, that a vocational assessment was not timely performed, and that plaintiff's school day was not sufficient in length. Plaintiff also argues that defendant changed plaintiff's IEPs without notice to his parents and that this change without notice constituted a per se violation under the IDEA, such that plaintiff did not receive a free and appropriate education as a matter of law. Plaintiff is seeking compensatory education from the school district.

Although given the opportunity to present evidence, the parties elected to proceed on the record developed before the state hearing officer. As such, the Court decides this case based on the administrative record before it, and the pleadings of the parties. The parties agree that plaintiff is autistic and is a

handicapped person under the IDEA. The parties also agree that plaintiff was eligible for a free appropriate public education until he reached the age of twenty-two. Plaintiff turned twenty-two on August 3, 1986. The parties are in dispute as to the remaining legal and fact issues involved.

The contested issues[2] are as follows:

1. Whether CCISD committed a per se violation of the IDEA by terminating short-term objectives at teacher staffings, to which the parents were not invited?

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[2] In denying CCISD's motions to dismiss, this Court held that compensatory education is an appropriate form of relief to remedy past violations of the IDEA, and that a plaintiff over the age of twenty-one, if successful in proving a violation under the IDEA, make seek compensatory education. Order Denying Motions to Dismiss and For Summary Judgment, dated and entered December 23, 1993, docket entry #60. See also Lester H. by Octavia P. v. Gilhool, 916 F.2d 865, 872 (3rd Cir. 1990) cert. denied, 111 S. Ct. 1317 (1991).

2. Whether plaintiff's parents were entitled to an "equal vote" in formulating plaintiff's IEPs at the Admissions, Review and Dismissal ("ARD") meetings?

3. Whether plaintiff's IEPs contained short-term objectives?

4. Whether plaintiff's IEP's were repetitive, such that the IEPs were not reasonably calculated to provide an educational benefit to plaintiff?

5. Whether CCISD failed to timely perform a vocational assessment, and if so, did that failure deprive plaintiff of a free and appropriate education?

6. Whether CCISD failed to provide plaintiff with a full instructional school day?

DISCUSSION

During the period of eligibility, the IDEA entitles emotionally, mentally or physically handicapped persons to a "free appropriate public education" is tailored to the individual and unique needs of the handicapped child by means of an individualized education program (IEP). 20 U.S.C. § 1401(20). This program is prepared at a meeting of representatives of the local education agency, the child's teacher(s), the child's parents or guardian, and when appropriate, the child. The plan contains statements of limits of performance, annual goals with short-term objectives, services to be provided, duration, and evaluation procedures. Id.

The most comprehensive test for determining whether any violation of the IDEA has occurred is et forth by the Supreme Court in Board of Education v.

Rowley, 458 U.S. 176, 102 S. Ct. 3034 (1982). In Rowley, the Supreme Court reversed and remanded an order requiring the school to provide a deaf student with a sign-language interpreter in all of her classes. The Supreme Court held that the IDEA's requirement of a "free appropriate public education" is satisfied when the state provides personalized instruction with sufficient support services to permit the handicapped child to benefit educationally from the instruction. Rowley, 458 U.S. at 201, 102 S. Ct. at 3048. The child must receive "some educational benefit" from the education provided; the best possible education in not required. Id.

The IDEA imposes strict procedural requirements on educators to ensure that a student's substantive right to a "free appropriate public education" is met. 20

U.S.C. §1415. These procedural requirement requirements allow for participation of the parents or guardian throughout the development of the IEPs, together with due process procedures to challenge questionable placements or decisions. Under Rowley, when challenges to a student's individualized educational program are made, the Court undertakes a two part inquiry, determining: (1) whether the procedural mandates of the act were followed and (2) whether the student received individualized educational services designed to provide some educational benefit. Rowley, 458 U.S. at 206, 102 S. Ct. at 3051. Plaintiff bears the burden of proof to show by a preponderance of the evidence that the defendant school did not provide an educational program designed to give "some educational benefit." Alamo Heights Indep.

School Dist. v. State Bd. of Education, 790 F.2d 1153, 1158 (5th Cir. 1986).

1. **Whether CCISD committed a per se violation of the IDEA by terminating short-term objectives at teacher staffings, to which the parents were not invited?**

The Court first examines whether CCISD followed the procedural mandates of the IDEA. In Rowley, the Supreme Court emphasized the importance of compliance with the procedural mandates of the IDEA:

> "When the elaborate and highly specific procedural safeguards embodied in §1415 are contrasted with the general and somewhat imprecise substantive admonitions contained in the Act, we think the importance Congress attached to these procedural safeguards cannot be gainsaid. It seem to us no exaggeration to say

> that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process, see, e.g., §§ 1415(a)-(d), as it did upon the measurement of the resulting IEP against a substantive standard.

--Rowley, 458 U.S. at 205-06, 102 S. Ct at 3050. The Supreme Court reasoned that "adequate compliance" with the procedural mandates would, in most cases, assure that the child's substantive right to a "free appropriate public education" had been met. Id.

While contesting the fact that his IEPs even contained short-term objective without notice to his parents. Plaintiff contends that the school's unilateral termination of short-term objectives

constitutes a change in his IEPs, thus triggering the notice provision of the IDEA. 20 U.S.C. § 1415(b)(1)(C)(i). See also, 34 C.F.R. § 300.343 (1986); Appendix C, Question No. 43, 34 C.F.R. Part 300 (1991). Plaintiff contends that this change without notice is not only procedural violation of the IDEA, but is also a per se violation, such that plaintiff did not receive a free appropriate public education as a matter of law.

The Fifth Circuit recognizes the concept of per se violations. In Jackson v. Franklin County School Bd., 806 F.2d 623, 629 (5th Cir. 1986), the Fifth Circuit held that the school's failure to convene a conference after excluding a child from school was a per se violation of the IDEA. Jackson, 806 F.2d at 628. The Fifth Circuit noted that the IDEA requires prior written notice to the parents or guardian

whenever a school "proposes to initiate or change...the identification, evaluation, or educational placement of the child..." Id. The Fifth Circuit concluded that "failures to meet the Act's procedural requirements are 'adequate grounds' by themselves for holding that the school failed to provide a free appropriate public education, as mandated by the Act." Id. at 629.

In attempting to establish a per se violation, plaintiff relies on the testimony Gaylord Meyers, the principal of Robert Wilson School. Mr. Meyers stated that plaintiff's teachers could terminate short-term objectives at quarterly staffings. Prior to 1985, plaintiff's parents were not invited to these staffings. Mr. Meyers' testimony is the only evidence plaintiff produces in support of his per se violation argument. Plaintiff produces no evidence to

demonstrate that the teachers actually did terminate short-term objectives, and plaintiff fails to specify which short-term objectives were eliminated or discontinued. In addition, the record shows that plaintiff's parents agreed to all of plaintiff's IEPs except the one for the 1985-86 school year and the transition of IEP.[3]

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[3] The record shows that either plaintiff's father, mother, or both, signed the ARD report under the "agree" column, for all but the last school year.

Date	Rec
08-25-78	1244
04-25-79	1136
05-01-80	756
09-23-80	740
04-30-81	1123
05-03-82	717
02-22-83	773
05-18-84	825
10-01-84	980

IEPs Agreed to by Parents

IEP 1978-79; signed by mother
IEP 1979-80; signed by both
IEP 1980-81; signed by father
IEP 1980-81; signed by mother
IEP 1981-82; signed by father
IEP 1982-83; signed by both

The Court also notes that despite the Fifth Circuit's acknowledgment of per se violations in Jackson, Fifth Circuit tempered this pronouncement in Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036 (5th Cir. 1989). In Daniel R.R., the Fifth Circuit held that a violation of the IDEA's procedural guarantees "may be a sufficient ground for holding that a school system has failed to provide a free appropriate education". In a later case, Weil v. Board of Elementary & Secondary Education, 931 F.2d 1069 (5th Cir.) cert. denied, 112 St. Ct. 306 (1991), the parents claimed a per

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IEP 1983-84; signed by mother
IEP 1984-85; signed by father
IEP 1984-85; signed by both

The IEPs to which the parents did not agree are the IEPs for the 1985-86 school year (IEP dated 9-6-85, signed by father under both "agree" and "disagree" column, R. 855) and transition IEP, (IEP dated 4-4-86, and signed by both parents under disagree, R. 1159).

se violation of the IDEA when their child was transferred to another school without written notice to the parents. While holding that the transfer did not constitute a change in the child's IEP, the Fifth Circuit noted that even if the transfer had constituted a change, thus triggering the notice requirements of the IDEA, the lack of notice was not actionable because any injury to the child was de minimis. Weil, 931 F. 2d at 1072. See also, Doe v. Alabama State Dept of Educ., 915 F. 2d 651, 662 (11th Cir. 1990) (adopting harmless error analysis in procedural violation context). Without further evidence on what objectives, if any, were terminated, the Court concludes that any injury can only be de minimis.

2. Whether plaintiff's parents were entitled to an "equal vote" in formulating plaintiff's IEPs at the

Admissions, Review and Dismissal ("ARD") meetings?

Plaintiff also challenges the failure of the school district to inform plaintiff's parents that they had an "equal vote" in formulating plaintiff's IEPs. Both Mr. and Mrs. Buser testified that they did not challenge plaintiff's earlier IEPs because of their belief that their votes would always be outnumbered by the votes of the school personnel. Plaintiff alleges that under the IDEA, parents, as a unit, are entitled to a vote equal to the collective vote of the school personnel. AS authority for his "equal vote" argument, plaintiff relies on Appendix C, Question No. 26, 34 C.F.R. Part 300 (1991) which provides that "parents are expected to be equal participants along with school personnel, in developing, reviewing and revising the child's IEP." Plaintiff

offers no additional authority to support his conclusion that "equal participants" is equivalent to an "equal vote".

The Supreme Court has referred to the IDEA's statutory scheme of procedural safeguards as "guaranteeing parents both an opportunity for meaningful input into all decisions affecting their child's education and the right to seek review of any decisions they think inappropriate." Honig v. Doe, 484 U.S. 305, 311 108 S. Ct. 592, 598 (1988). Rowley refers to the "large measure of participation" for parents and guardians at every stage of the administrative process. Board of Education v. Rowley, 458 U.S. 176, 205, 102 S. Ct. 3034, 3050 (1982). The Court concludes that equal opportunity to participate and offer input is not equivalent to block voting. To adopt plaintiff's argument would allow parents to prevent the

implementation of an IEP anytime there was a disagreement. This is not the intent of the IDEA. Plaintiff's remedy is the administrative hearing and appeal to this Court. Plaintiff's claim is a misstatement of the law, and therefore, CCISD did not violate the IDEA in not informing plaintiff's parents that they had an "equal vote" at ARD meetings.

One of plaintiff's special education teacher, Karol D'Huyvetters, remarked on plaintiff's improvement after three years of special education, commenting that plaintiff had made great improvement in learning appropriate behavior. Negative behaviors such as running away, choking himself, biting his hand and throwing tantrums had decreased. In 1980, examples of goals set for plaintiff were signing two word sentences, tracing a stencil and running in a straight line. Plaintiff's

disability makes it difficult for him to acquire even the most basic self-help skills.

CCISD's witnesses (one of plaintiff's special education teacher, a vocational expert, the principal of plaintiff's school, and a former director of special education at another learning center) each testified that plaintiff's IEPs were reasonably calculated to enable plaintiff to receive educational benefits. Plaintiff's teacher, Susan Abbott, testified that plaintiff received substantial educational benefit from the school. Ms. Abbott recalled working with plaintiff on neuromotor skills, ceramics, pre-vocational tests, and independent living and self-help skills. Plaintiff also participated in the vocational orientation program, spent six weeks in the vocational workshop, and worked with an

occupational therapist. A workbench was set up in plaintiff's classroom, and plaintiff was provided wood, saws, hammers and other tools.

Plaintiff also received help in socialization from the school. Susan Abbott testified that she often took plaintiff on day-long field trips. The field trips usually involved swimming or some gross motor activity in the morning, followed by lunch in a restaurant. The rest of the afternoon might be spent at the mall or at the school cafeteria for a school dance. Plaintiff spent about six hours every week in community activities.

All of plaintiff's teachers were special education teachers. In 1979, 1980, and 1981, the autistic program at the Robert Wilson School was cited as an exemplary program by the Commissioner for Special Education. The school was selected

in 1978 and 1980 as a demonstration school in individualized instruction network. The principal, Gaylord Meyers, was named principal of the year by the National Autistic Society. Plaintiff's teacher for the 1978-79 school year, Karol D'Huyvetters, received statewide recognition in teaching autistic children, and was asked by the Texas Education Agency to lead a workshop on teaching autistic children. Plaintiff's mother wrote a letter of support acknowledging her satisfaction with Karol D'Huyvetters. Plaintiff's mother later wrote a letter commending Susan Abbott on her knowledge of autism and teaching abilities. Since 1978, the student/teacher ratio in plaintiff's classes was one teacher and one aide for every two students, or less. There was extensive testimony describing the numerous conferences, lectures and seminars that

special education teachers attend each year. The school also invites outside consultants to lead workshops on autism of school grounds. The evidence shows that plaintiff's school was a model program staffed by competent and well-trained teachers.

Plaintiff alleges that his education was inadequate beginning with the 1978-79 school year, the year in which the IDEA first went into effect, through the end of the 1985-86 school year. As previously noted, however, plaintiff's parents, who each took an active roll in their son's education and the development of his IEPs, approved the IEPs for every school year except the last, and the transition IEP. Although the Court will examine each of plaintiff's claims, the parents' repeated approval of the IEPs is compelling and persuasive evidence that plaintiff's IEPs

were designed to provide some educational benefit. Plaintiff bears the burden of proof in establishing that his IEPs were inadequate. Alamo Heights Indep. School Dist. v. State Bd. of Educ., 790 F.2d 1153, 1158 (5th Cir. 1986). This burden is particularly difficult in this case because of the consistent and repeated approval of the IEPs by plaintiff's parents. The Court now turns to plaintiff's specific complaints concerning his individualized education program.

3. Whether plaintiff's IEPs contained short-term objectives?

The IDEA provides that an IEP shall include "a statement of annual goals, including short-term instructional objectives." 20 U.S.C. §1401(20)(B). The State Board of Education Rules require IEPs to include "short-term instructional objectives, which are measurable

intermediate steps designed to lead to achievement of the annual goals...." 19 Tex. Admin. Code § 89.223(a)(3) (West 1991). An additional provision applicable to autistic students requires that the IEP have "prioritized" behavioral objectives. 19 Tex. Admin. Code § 89.223(c) (West 1991).

"Short-term" is not defined in the IDEA. In the statute and state rules, "short-term" is used in contrast to "annual", and the mandate of "measurable intermediate steps" indicates something less than an annual goal. "IEP objectives provide general benchmarks for determining progress toward meeting the annual goals". Appendix C, Question No. 39, 34 C.F.R. Part 300 (1991). The Court concludes that short-term objectives must be shorter in duration than annual goals. Plaintiff argues that his IEPs contained "things

called objectives", but that these "objectives" were not intermediate or short-term because the time within which they were to be performed was either not stated or was the whole school year.

One of plaintiff's witnesses, Katherine Webb, a special education teacher and diagnostician, testified that plaintiff's IEPs did not contain short-term objectives because time frames for completing the objectives were not specified. Pat Cox, a private special education consultant specializing in autism, reviewed plaintiff's IEPs and found that there was no prioritization of behavioral objectives. Mr. Cox also testified that the objectives in an IEP should be more detailed than daily lesson plans. Ms. Webb openly disagreed with Mr. Cox's assertion that the short-term instructional objectives in the IEP should

be more detailed than the lesson plan. Ms. Webb also testified that different educators have different ideas about what is an appropriate objective, and that a range of opinion exists concerning how specific an objective must be. In weighing the testimony of plaintiff's experts, the Court cannot overlook that plaintiff's experts could not agree on what is a proper short-term objective; however, the experts did agree that plaintiff's IEPs were reasonably calculated to provide some educational benefit.

Appendix C, Question No. 33, 34 C.F.R. Part 300 (1991), addresses the specificity required in IEPs:

> The goals and objectives in the IEP should be helpful to both parents and school personnel, in a general way, in checking on a child's progress in the special education program...

> However, since the IEP is not intended to include the specifics about a child's total educational program that are found in daily, weekly or monthly instructional plans, parents will often need to obtain more specific, ongoing information about the child's progress--through parent/teacher conferences, report cards and other reporting procedures ordinarily used by this agency.

In addition, Appendix C, Question No. 37. 34 C.F.R. Part 300 (1991), provides that "(t)he goals and objectives in the IEP are not intended to be as specific as the goals and objectives that are normally found in the daily, weekly or monthly instructional plans." Based on this commentary to the federal regulations, the Court finds that the IEP is a general document which does

not include, daily, weekly or monthly instructional plans. The Court concludes that Mr. Cox's opinion that the IEP objectives should be more specific than daily or weekly lessons plans is not consistent with the requirements of the IDEA. In addition, the Court notes that much of Mr. Cox's review of the "present competencies" section, rather than the proposed goals and objectives. As such, the Court must disregard much of Mr. Cox's testimony concerning short-term objectives as Mr. Cox was not evaluating the proper section of the IEP.

Katherine Webb concluded that plaintiff's IEPs did not contain short-term objectives because no time frame for completing the IEPs was stated. The Court agrees that specifying time frames for completion of short-term objectives may be preferable and helpful, but time frames are

not required by the IDEA. In addition, the fact that plaintiff's IEPs were reviewed every ninety days suggests that the objectives had at least a ninety-day review period, making the objectives shorter in duration than annual goals. The Court concluded that plaintiff's IEPs contained short-term objectives.

Pat Cox testified that, based upon his review of plaintiff's IEPs, he could find no prioritization of plaintiff's behavioral objectives was shown by headings and sub-headings. Ms. Abbott also testified that she had no trouble preparing her daily lesson plans from the objectives in plaintiff's IEPs. The Court finds that plaintiff's IEPs contained prioritized behavioral objectives, and that plaintiff's teachers were competent in implementing plaintiff's IEPs with the proper emphasis on behavioral objectives.

4. Whether plaintiff's IEPs were repetitive, such that the IEPs were not reasonably calculated to provide an educational benefit to plaintiff?

Plaintiff argues that many of the goals contained in the plaintiff's IEPs were repetitive such that plaintiff was at a "virtual standstill" in his educational process. Katherine Webb testified that the repetitiveness of the objectives prevented plaintiff from making any educational progress. Pat Cox criticized the continuation of a goal from IEP to IEP, where little or no mastery of the goal was shown. Plaintiff argues that the repeating of goals indicates that the goals were either unattainable and should have been modified or eliminated, or had been mastered, and therefore, should not have been repeated in subsequent IEPs.

The Court must again note that plaintiff's parents repeatedly ratified the repetition of which they now complain. In addition, Mrs. Buser acknowledged that plaintiff's behavior in public had improved since 1978, although she attributed the improvement of factors other than his education. She admitted that in 1980 the Austin Evaluation Center reported great improvement in her son since a previous evaluation. Pat Cox admitted that plaintiff received some educational benefit from sign training. Mr. Cox also conceded that most of the goals and objectives contained in plaintiff's IEPs would provide some educational benefit, if implemented. The testimony is uncontroverted that plaintiff's IEPs were implemented. Plaintiff's teacher Susan Abbott testified that plaintiff showed progress in his education.

Plaintiff is autistic and progress with autistic student is extremely difficult and slow. The Supreme Court recognized in Rowley that some students will encounter great difficulty in acquiring even the most basic self-help skills. Board of Education v. Rowley, 458 U.S. 176, 202, 102 S. Ct. 3034, 3049 (1982). This Court recognizes that is some cases a student may never master a goal. However, if the goal is appropriate, it would be harmful to eliminate that goal just because it is repetitious. The Court concludes that the repetition in plaintiff's IEPs was reasonably calculated to provide plaintiff with some educational benefit.

5. Whether CCISD failed to timely perform a vocational assessment, and if so, did that failure deprive plaintiff of a free appropriate public education?

Plaintiff contends that his May 1982 IEP required defendant to perform a vocational assessment during the 1982-83 school year. It is undisputed that no vocational assessment was performed until April 12, 1984. Plaintiff argues that this two year delay denied plaintiff an appropriate education. Defendant counters that a vocational assessment was not agreed to in the May 1982 IEP. Alternatively, CCISD argues that despite the delay, plaintiff did receive pre-vocational and vocation training in 1982-83 and 1983-84, and that plaintiff has failed to show any harm to plaintiff caused by the delay.

The school district provides the preprinted ARD form. The preprinted form contains a number of sections, designated by roman numerals. Section IV of the May 1982 IEP is entitled "Individual educational plan". Subsection A of Section

IV lists plaintiff's present competencies. Subsection B of Section IV outlines plaintiff's annual goals and short-term objectives. There is no reference to a vocational assessment in Section IV. Section V of the ARD report provides a space to summarize the discussion and comments of the ARD committee members. Specifically, the "heading" of Section V states: During the development of the individual educational plan, the committee discussed alternative services and recommendations of individual committee members. A summary of that discussion is: Handwritten in Section V is the sentence "(v)ocational assessment to be done in '82-'83." Based on its examination of the May 1982 IEP, the Court concludes that the vocational assessment was not part of the 1982-83 IEP, but was only a recommendation or request that one be performed.

The Courts reject's plaintiff's argument that the ARD report containing plaintiff's IEP was too confusing or difficult a document for plaintiff's parents to understand. Plaintiff's father, Dr. Buser, is a professor of history at Del Mar College in Corpus Christi, Texas. Plaintiff's mother has a master's degree in history and English. Mrs. Buser is also very active in advocating the rights of disabled students, including representing other parents in asserting their rights, and appearing at ARD meetings for other students as a parent representative. In addition, Mrs. Buser has received various booklets explaining parental rights, and has attended workshops regarding autism and procedural rights of parents. Plaintiff's argument that Section IV is indistinguishable form Section V is without merit. Further, the record clearly shows

that the vocational assessment was not agreed to in the May 1982 IEP, and Mrs. Buser herself characterized the discussions concerning the assessment as "a dispute".

Even assuming that the vocational assessment requested by the parents was required during the 1982-83 school year, the Court finds that plaintiff suffered no harm from the delay in receiving the formal assessment. The evidence establishes that CCISD adequately addressed plaintiff's vocational needs, and that skilled vocational personnel provided training to plaintiff without the formal assessment. The vocational adjustment coordinator for the school, Jim Quernemoen, testified that plaintiff's February 1983 IEP addressed several pre-vocational and vocational skills. Mr. Quernemoen specifically mentioned workshop items, and referred to activities such as sorting by similar

objects, size and quantity; closing various types of containers; collating numbered pages; and using a stamp and stamp pad, among other activities. Mr. Quernemoen testified that the 1983-84 IEP included vocational and pre-vocational activities such as using appropriate tools to tighten objects; using a stapler, rubber bands, a dustpan and a dustmop; cleaning windows; and working with ceramics. According to Mr. Quernemoen, these activities were appropriate vocational and pre-vocational objectives, and the school was adequately addressing plaintiff's vocational needs even prior to the formal vocational assessment being performed.

Effective August 11, 1983, Texas law requires a disabled student's occupational needs to be evaluated. 19 Tex. Admin. Code § 890233 (1991). During the 1983-84 school year, CCISD administered a vocational

assessment to plaintiff, known as the McCarron/Dial Diagnostic Test. Plaintiff's parents criticized the manner in which Marilyn Harrison administered the McCarron/Dial vocational assessment, stating that she did not have enough experience with administering the test or reading the test results. However, Dr. Lawrence McCarron, a nationally acclaimed expert on vocational assessment of handicapped individuals and a developer of the test, testified that Ms. Harrison's report was validly constructed, appropriate vocational assessment. In addition, in response to the parent's complaints, the school board paid for Dr. McCarron to perform a second assessment. The evidence is persuasive that CCISD addressed plaintiff's vocational needs and was receptive to the parents' comments and concerns regarding plaintiff's vocational

needs.

As plaintiff approached age twenty-two, the school coordinated with the Nueces County Mental Health/Mental Retardation ("MHMR") Community Center to ensure plaintiff's orderly transition from the school to MHMR. For example, in the first month of the summer term for the 1984-85 school year, either Jim Quernemoen or an aide went with plaintiff to MHMR for a half day, every day. Jim Quernemoen testified that he communicated extensively with MHMR officials about the transition. In addition, the school incorporated the suggestions of Dr. McCarron into plaintiff's transition IEP. Although plaintiff fails to allege a specific complaint about the transition IEP, the Court finds that the transition IEP focused on plaintiff's vocational development, and provided some educational benefit to plaintiff.

6. **Whether CCISD failed to provide plaintiff with a full instructional school day?**

Plaintiff complains that during the 1978-79 through the 1984-85 school years plaintiff received less than six hours of instruction a day. By letter dated February 26, 1985, plaintiff's parents, on behalf of plaintiff and other students, complained to the Texas Education Agency concerning the length of the school day provided to special education students at the Robert Wilson School. TEA sustained the parent's allegation and required CCISD to provide a six hour instructional day for students in grade four or above. Despite the resolution of this complaint, plaintiff argues that as a result of the shorter school day during the 1978-79 to 1984-85 school years, plaintiff was denied a free appropriate public education and is

entitled to compensatory educational as a proper form of relief.

The "free appropriate public education" mandated by the IDEA must "meet the standards of the State educational agency". 20 U.S.C. § 1401(18). The Texas Education Code § 21.004 (Vernon 1987) states that a school day shall be taught for not less than seven hours each day, including intermissions and recesses. Plaintiff contends that the failure of CCISD of provide a full instructional day, as evidenced by the TEA's ruling on that issue, is evidence that plaintiff did not receive a "free appropriate public education." The Court cannot agree.

The Texas State Board of Education Rules require that disabled students "have available an instructional day commensurate with that of students without handicapped students." 19 Tex. Admin. Code § 89.235(d)

(West 1991). The rule continues: "(t)he admission, review, and dismissal committee shall determine the appropriate instructional setting and length of day for each student, and these shall be specified in the student's individual educational plan." 19 Tex. Admin. Code § 89.235(d) (emphasis added). Thus, under Texas law, the general practice of providing a seven-hour school day does not apply to a handicapped child whose admission, review and dismissal committee has found a shorter school day to be appropriate. Christopher M. by Laveta v. Corpus Christi Independent School District, 933 F.2d 1285 (5th Cir. 1991).

Plaintiff's teacher testified that plaintiff received the full instructional day called for in his IEPs (and agreed to by his parents). In addition, plaintiff received an extra month of summer education

every year since 1978. The Court concludes that plaintiff received the full amount of instructional time required under plaintiff's individualized educational program.

CONCLUSION

The Court finds that CCISD complied with the procedural mandates of the IDEA, that plaintiff's IEPs were designed to provide some educational benefit to plaintiff, and that plaintiff did receive some educational benefit while attending CCISD. The Court finds that throughout plaintiff's schooling, CCISD attempted to accommodate the various requests and concerns of plaintiff's parents, and in fact, that CCISD went beyond the "basic floor of opportunity" in the services it provided to plaintiff. Board of Education v. Rowley, 458 U.S. 176, 201, 102 S. Ct. 3034, 3048 (1982). The Court concludes

that at all times CCISD acted in good faith in developing and implementing plaintiff's individualized educational programs. As such, the Court finds in favor of CCISD an orders that judgment be awarded to defendant that plaintiff take nothing on his claims, and that defendant be awarded its costs.

ORDERED this 17 day of Jan., 1994.

/s/ H.W. Head, Jr.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE

SOUTHERN DISTRICT OF TEXAS

CORPUS CHRISTI DIVISION

JOHN E. BUSER, JR.,
by his next friends

JOHN E. AND VIRGINIA BUSER

VS.

CORPUS CHRISTI INDEPENDENT SCHOOL DISTRICT

§ UNITED STATES DISTRICT
§ COURT SOUTHERN DISTRCT
§ OF TEXAS
§ ENTERED
§ JAN 18 1994
§ Michael N. Milby,
§ Clerk By Deputy
§
§
§ C.A. NO. C-87-114

FINAL JUDGMENT

A final judgment is hereby entered in favor of defendant Corpus Christi Independent School District that plaintiff take nothing on his claims. Costs are awarded to defendant.

ORDERED this 17 day of Jan., 1994.

/s/ H.W. Head, Jr.
H.W. HEAD, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITES STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS CORPUS CHRISTI DIVISION

JOHN E. BUSER, JR.
by his next friends,
JOHN E. AND VIRGINIA BUSER

V.

CORPUS CHRISTI INDEPENDENT SCHOOL DISTRICT

§ UNITED STATES
§ DISTRICT COURT OF
§ TEXAS
§ ENTERED
§ DEC 23 1993
§ Michael N. Milby,
§ Clerk By Deputy
§
§
§ C.A. NO. C-87-114

ORDER DENYING MOTIONS TO DISMISS

AND FOR SUMMARY JUDGMENT

Plaintiff, through his parents as representatives, sued the defendant under the Education for the Handicapped Act ("EHA"), 20 U.S.C. § 1400 et seq., alleging that the defendant, CCISD, in a number of manners and ways, has failed to provide plaintiff with a "free appropriate public education." Plaintiff is autistic and, as a handicapped person under the EHA, received educational benefits from the defendant until he was age 22 when services terminated because of age limitations in

the EHA. Shortly before he turned 22, the plaintiff initiated administrative proceedings to obtain educational benefits for him beyond the age of 22. The plaintiff says he is entitled to these additional benefits as compensation for violations of the EHA occurring before he was 22.

At various places in its answers, the defendant challenged the ability of the Court to award relief on the grounds that the plaintiff is past age 22 and is no longer eligible for EHA benefits. Honig v. Doe, 108 S. Ct. 592 (1988), cited by defendant as authority for this proposition, is not applicable to this case. In Honig v. Doe, Doe sued his school district to prevent his future expulsion from the school system. The Supreme Court found that since he was no longer a student in the system, there was no possibility of

his future suspension and ruled the issue was moot as to him. The Supreme Court did not address the issue of this case in which a plaintiff is seeking the remedy of compensatory education for alleged violations of the EHA occurring to him while he was an appropriate recipient of statutory benefits.

Ample circuit authority dispels defendant's insistence that plaintiff has no suit because he can have no benefits. Lester H. by Octavia P. v. Gilhool, 916 F.2d 865 (3d Cir. 1990), cert. denied, 111 S. Ct. 1317 (1991), is only one of several cases that hold that compensatory education is an acceptable remedy under the EHA and is available to those beyond the age of 21. Defendant's motions to dismiss on the basis of mootness and for failure to state a claim are denied.

Defendant also seeks dismissal on all

of plaintiff's claims arising two years before May 22, 1986, the date administrative proceedings for relief were begun. Defendant argues that plaintiff is barred by a two-year statute of limitations for violations occurring more than two years before that date. The EHA has no stated period of limitations; therefore, the Court is directed by 42 U.S.C. § 1988 to select an appropriate limitations period in a tiered scheme. Hickey v. Irving Indep. Sch. Dist., 976 F.2d 980 (5th Cir. 1992). Application of this tiered scheme leads to the Court to select the most applicable state statute of limitations, which the Court finds to be the Texas two-year limitations period for personal injury claims. Tex. Civ. Prac. & Rem. Code Ann. § 16.003; McDowell v. Fort Bend Indep. Sch. Dist., 737 F. Supp 386 (S.D. Tex. 1990). State tolling rules are also applicable.

Id. at 389. Causes of action, at law and in equity alike, are tolled during periods of infancy and incompetency. Tex. Civ. Prac. & Rem. Code Ann § 16.001. Although plaintiff's infancy concluded more than two years before his administrative complaint was filed, his incompetency has not.

No Fifth Circuit decision addresses this issue, but other appellate courts have recognized that state tolling statutes can or do preclude the dismissal of EHA claims on limitations grounds. See Alexopulos v. San Francisco Unified Sch. Dist., 817 F.2d 551 (9th Cir. 1987), on the grounds of infancy, and Shook v. Gaston County Bd. of Educ., 882 F.2d 119 (4th Cir. 1989), on the grounds of infancy and incompetency. Suit here was brought on plaintiff's claim for reimbursement. Plaintiff's claims survive for consideration, and the Court denies the motion to dismiss on limitations grounds.

Defendant's and plaintiff's cross-motions for summary judgment are denied. The Court will consider the proceeding based upon the evidence developed before the hearing officer and before the Court. The Court does not have from the hearing officer detailed findings of fact and conclusion of law. What findings the Court does have from an extensive record can only be generously described as skeletal. Neither party has submitted proposed findings of fact and conclusions of law.

For the foregoing reasons, all motions to dismiss and motions for summary judgment are denied.

ORDERED this 23 day of Dec., 1993.

/s/ H.W. Head, Jr.
UNITED STATES DISTRICT JUDGE

§ 1401. Definitions

(a) As used in this chapter

* * * * *

(18) The term "free appropriate public education" means special education and related services that ---

* * * * *

(D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

* * * * *

(20) The term **"individualized education program"** means a **written** statement for each child with a disability developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include--

* * * * *

(B) a statement of annual goals, including short-term instructional objectives, (Emphasis added.)

* * * * *

§ 1415. Procedural safeguards

(a) Establishment and maintenance

Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this subchapter shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that children with disabilities and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

(b) Required procedures; hearing

(1) The procedures required by this sections shall include, but shall not be limited to--

* * * * *

(C) **written prior notice to the parents** or guardian of the child whenever such agency or unit--

(I) **proposes to** initiate or **change**, or

(II) refuses to initiate or change, the identification, evaluation, or educational placement of the child **or the provision of a free appropriate public education** to the child; (Emphasis added.)

* * * * *

(e) Civil action; jurisdiction

(1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall be final,

except that any part involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a part, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

* * * * *

§ 300.343 Meetings

(a) *General.* Each public agency is responsible for initiating and **conducting meetings** for the purpose of developing, **reviewing**, and revising the IEP of a child with a disability

(d) *Review.* Each public agency shall initiate and conduct meetings to review each child's IEP periodically and, if appropriate, revise its provisions. A meetings must be held for this purpose at least once a year.
(Authority: 20 U.S.C. 1412(2)(B), (4),(6); 1414(a)(5))

NOTE: The date on which agencies must have IEPs in effect is specified in § 300.342 (the beginning of each school year). However, except for new children with disabilities (i.e., those evaluated and determined to need special education and related services for the first time), the timing of meetings to develop, review, and revise IEPs is left to the discretion of each agency.

In order to have IEPs in effect at the beginning of the school year, agencies could hold meetings either at the end of the preceding school year or during the summer prior to the next school year. Meetings may be held any time throughout the year, as long as IEPs are in effect at the beginning of each school year.

The statute requires agencies to hold a meeting at least once each year in order to review and, if appropriate, revise each child's IEP. The timing of those meetings could be on the anniversary date of the child's last IEP meeting, but this is left to the discretion of the agency.

§300.345 Parent participation.

(a) Each public agency shall take steps to ensure that one or both of the parents of the child with a disability are present at each meeting or are afforded the opportunity to participate, including--

(1) Notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; and

* * * * *

§ 300.346 Content of individualized education program

(a) *General.* The IEP for each child must include--

(2) A statement of annual goals, including short-term instructional objectives;

(5) Appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether the short term instructional objectives are being achieved.

* * * * *

26. What is the role of the parents at an **IEP meeting?** The parents of a child with a disability are expected to be equal participants along with school personnel, in developing, reviewing, and revising the child's IEP. This is an active role in which the parents (1) participate in the discussion about the child's need for special education and related services, and (2) join with the other participants in deciding what services the agency will provide to the child.

NOTE: In some instances, parents might elect to bring another participant to the meeting, e.g., a friend or neighbor, someone outside the agency who is familiar with applicable laws and with the child's needs, or a specialist who conducted an independent evaluation of the child.

33. Does the IEP include ways for parents to check the progress of their children?

In general, the answer is yes. The IEP document is a written record of decisions jointly made by parents and school personnel at the **IEP meeting** regarding the special education program of a child with a disability. That record includes agreed upon items, such as goals and objectives, and the specific special education and related services to be provided to the child. (Emphasis added.)

* * * * *

34. Must IEPs include specific checkpoint intervals for parents to confer with teachers and to revise or update their children's IEPs?

No. The IEP of a child with a disability is not required to include specific "checkpoint intervals" (i.e., meeting dates) for reviewing the child's progress. However, in individual situations, specific meetings dates could be designated in the IEP, if the parents and school personnel believe that it would be helpful to do so.

Although meetings dates are not required to be set out in the IEP itself, there are specific provisions in the regulations and in this document regarding agency responsibilities in initiating **IEP meetings**, including the following: (1) Public agencies must hold meetings periodically, but not less than annually, to review, and if appropriate, revise, each child's IEP (§ 300.343(d)); (2) there should be as many meetings a year as the child needs (see Question 10, above); and (3) agencies should grant any reasonable

request for an IEP meeting (see Question 11, above). (Emphasis added.)

* * * * *

39. What are short term instructional objectives in an IEP?

Short term instructional objectives (also called IEP objectives) are measurable, intermediate steps between the present levels of educational performance of a child with a disability and the annual goals that are established for the child. The objectives are developed based on a logical breakdown of major components of the annual goals, and can serve as milestones for measuring progress toward meeting the goals.

In some respects, IEP objectives are similar to objectives used in daily classroom instructional plans. For example, both kinds of objectives are used (1) to describe what a given child is expected to accomplish in a particular are **within some specified time period**, and (2) to determine the extent that the child is progressing toward those accomplishments. (Emphasis added.)

* * * * *

43. Can short term instructional objectives be changed without initiating another IEP meeting?

No. Section 300.343(a) provides that the agency "is responsible for initiating and conducting meetings for the purpose of developing, reviewing, and *revising* the IEP of a child with a disability" (Emphasis added.). Since a change in short term instructional objectives constitutes a revision of the child's IEP, the agency must (1) notify the parents of the proposed change (see §300.504(a)(1), and (2) initiate an IEP meeting. Note, however, that if the parents are unable or unwilling to attend such a meeting, their participation in the revision of the IEP objectives can be obtained through other means, including individual or conference telephone call (see §300.346(c).

No. 95-280

Supreme Court, U.S.
FILED
SEP 15 1995
CLERK

In The

Supreme Court of the United States

October Term, 1995

JOHN E. BUSER, JR., by his next friends,

JOHN E. and VIRGINIA BUSER,

Petitioners,

vs.

CORPUS CHRISTI INDEPENDENT SCHOOL DISTRICT,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether legally significant per se violations of the Individuals with Disabilities Education Act ("IDEA") occurred because parents of an autistic student, were not invited to participate in staff quarterly progress reviews of their son's individualized education program ("IEP") prior to the 1984-85 school year and because, although the parents were active participants in their son's education their written requests generally were not included in their son's IEPs and because IEPs were adopted by oral vote in which the other members of the planning committee expressed their agreement with the IEPs before the parents were called upon to express their agreement or disagreement?

2. Whether legally significant per se violations of the IDEA occurred because, although the autistic student's IEPs each year contained a multitude of short term objectives, no specific date was spelled out in the IEPs for projected completion of each short term objective?

3. Whether a live case or controversy exists where there is no claim in this appeal that a student's special education program provided through age 21 was inadequate or deficient, but where equitable relief in the form of two years of post-age 22 job training is sought as "compensatory education" due to alleged procedural violations which are not alleged or proved to have deprived the student of educational benefits?

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No. 95-280

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

JOHN E. BUSER, JR., by his next friends,

JOHN E. and VIRGINIA BUSER,

Petitioners,

v.

CORPUS CHRISTI INDEPENDENT SCHOOL DISTRICT,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

TO THE UNITED STATES SUPREME COURT:

Corpus Christi Independent School District, Respondent, files this Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals

for the Fifth Circuit, and asks this Court to deny the Petition to review the opinion issued April 21, 1995, by the Fifth Circuit Court of Appeals.[1]

OPINIONS BELOW, JURISDICTION, STATUTES AND REGULATIONS INVOLVED

The opinion of the Fifth Circuit Court of Appeals is reported as *Buser by Buser v. Corpus Christi Independent School*, 51 F.3d 490 (5th Cir. 1995), and is copied as Appendix A to the Petition. The opinion and judgment of the District Court are unreported. They are copied as Appendices C[2] and D to the Petition.

The applicable statutes are portions of the Individuals with Disabilities Act, 20 U.S.C.A. § 1400, et seq., including relevant portions of § 1401(a)(20), § 1412(2)(B), § 1415(b)(1)(C), § 1415(b)(2), § 1415(e)(2); regulations in 34 C.F.R. Part 300, including § 300.343, § 300.346. Copies are included in Petitioners' Appendices F through I, except for § 1412(2)(B) and § 1415(b)(2). These sections are copied herein in Appendix A.

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[1] Petitioner's Appendix A, p. A-1, incorrectly indicates the opinion was issued April 14, 1994. The correct date is April 21, 1995. See Petitioner's Appendix B, p. B-1 and the published opinion at 51 F.3d 490.

[2] Petitioner's Appendix C accurately reflects the District Court's opinion except for the omissions as stated in Respondent's Appendix C.

The Texas State Board of Education regulations include the following relevant portions of the Texas Administrative Code, 19 T.A.C. § 89.220, § 89.221(a), (b)(7) and (10). (Respondent's Appendix B)

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the Court Below.

This suit concerns the individual education program of a student with disabilities and is based on 20 U.S.C.A. § 1400, et seq., now known as the Individuals with Disabilities Education Act ("IDEA"). This proceeding was initiated in 1986 when Dr. and Mrs. John E. Buser, Sr., requested a due process hearing pursuant to 20 U.S.C.A. § 1415(b)(2) regarding the individual education program of their autistic son, John E. Buser, Jr. ("John"). John was then age 21 years, 9 months. His eligibility for special education services ended with the 1985-86 school year. See 20 U.S.C.A. 1412(2)(B) and 19 T.A.C. § 89.220(a).

The administrative hearing officer denied relief. (R. 268-289).[3] The Busers then sought judicial review under 20 U.S.C.A. § 1415(e)(2). The United States District Court for the Southern District of Texas determined that Corpus Christi

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[3] The notation "R.____" represents the page of the District Court record. The notation "Ad.R. ____" represents the page of the administrative record. The notation "Pet. App." refers to the appendices attached to the Petition.

Independent School District ("CCISD" or the "School District") complied with statutory requirements, and denied relief. (R. 4-27; reproduced in Pet. App. C, except for the omissions described in Respondent's Appendix C.

The United States Court of Appeals for the Fifth Circuit affirmed the judgment of the District Court. See *Buser by Buser v. Corpus Christi Independent School*, 51 F.3d 490 (5th Cir. 1995). (Pet. App. A) The Busers then filed a Petition for Writ of Certiorari to this Court.

B. Statement of Facts.

John E. Buser, Jr., is an autistic 31-year old man born August 3, 1964, (Ad.R. 29) who was enrolled in Corpus Christi Independent School District through the 1985-86 school year. Pursuant to the Education of the Handicapped Act (now known as the Individuals with Disabilities Education Act or "IDEA"), 20 U.S.C.A. § 1400, et seq, John's individualized education program ("IEP") was developed at least annually by a committee composed of school district personnel and John's parents. In Texas, the program planning team described in 34 C.F.R. § 300.343 is called the "Admission, Review, and Dismissal Committee" or "ARD Committee."[4] See 19 T.A.C. § 89.221.

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[4] Petitioners assert that the term "Admission, Review, and Dismissal" Committee (or "ARD" Committee) is the School District's terminology. See Petition p. 4, footnote 1. This is incorrect. The terminology is that of the Texas State Board of Education. See 19 T.A.C. § 89.221.

Dr. and Mrs. Buser are very well educated and knowledgeable parents. Virginia Buser holds master's degrees in both history and in English, and is active as a parent advocate for disabled students and their parents, including assisting parents with respect to procedural rights under the IDEA. (Ad.R. 58-63). Dr. Buser holds a Ph.D. and is a professor of history at Del Mar College in Corpus Christi. (Ad.R. 63, 694)

Dr. and Mrs. Buser were very active in John's education. (Ad.R. 345, 657) At ARD Committee meetings through the years prior to and including 1984, Dr. and/or Mrs. Buser indicated their agreement with all the IEPs developed for John at such committee meetings. Disagreement began thereafter. See the summary in the District Court's decision, footnote 3. (Pet. App. C-12 and C-13). To ascertain whether committee members agreed or disagreed with the plan, the members were polled at the conclusion of each ARD Committee meeting. For the first time, the Busers in May 1986 invoked the due process procedure in 20 U.S.C. 1415(b)(2) to challenge the ARD Committee's decision.

The Busers' challenge resulted in decisions at the administrative, district court, and appellate court levels, all of which rejected the Busers' claims. (See Pet. App. A and C.) John's parents do not seek reversal of the lower court's judgment based on any alleged deficiency in John's program. Instead, they argue that per se procedural violations occurred which, standing alone and without proof of any harm to John, require the School District to provide the equitable remedy of

compensatory education for John in the form of the two years of job training.

Over the years, John's ARD Committees included in his IEPs many annual goals and many more short-term objectives as component parts of the annual goals. The number of short-term objectives varied over the years, from a low of 14 in the April 25, 1979, IEP to a high of 130 in the February 22, 1983, IEP. (Ad.R. 949-960, 1006-1014, 1024-1034, 1098-1107, 1119-1121, 1126-1127, 1139-1140) The IEPs included a starting date for instruction on the objectives, but did not state a stopping date or projected completion date for the objectives.

John's individualized educational program developed for each school year was put into action using a variety of techniques and equipment to address his learning and behavioral needs. For example, during his last two school years, John's program included, among other things, work on neuromotor and perceptive skills, pre-vocational and vocational skills, community activities, and independent living skills. (Ad.R. 363-377).

John's IEPs were implemented each year by his teachers, all of whom were trained in teaching special education. In addition, they attended numerous conferences, workshops, and seminars on autism; one of his teachers had received state-wide recognition as a teacher of autistic children; the school principal had been honored in 1979 as principal of the Year by the National Society for Children and Adults of Autism; the school had been cited by the state as

having an exemplary program and was selected as a demonstration school; and the school district developed a teacher's guide for teaching autistic children. (Ad.R. 76, 638-639, 646-658) Furthermore, at the request of Dr. and Mrs. Buser, the school district contracted with Dr. Lawrence McCarron, a pioneer in the field of vocational evaluation, to conduct for John a vocational assessment using the McCarron/Dial evaluation system. (R. 434-35)

During the course of each school year as John's IEPs were implemented and evaluated on a daily basis (R. 384, 396), his progress in completing components of his IEPs was also reviewed on a quarterly basis by school staff. As John reached his targeted mastery levels on short-term objectives, instruction on such completed objectives was discontinued, while instruction on the non-mastered objectives continued. (R. 389-90; 661) Beginning in the 1984-85 school year, Dr. and Mrs. Buser were invited to participate in these periodic reviews or "staffings." (Ad.R. 682-683)

In their appeal, the Busers characterize the quarterly staffings as "IEP meetings" within the meaning of 34 C.F.R. § 300.343. However, quarterly staffings to review implementation and progress were not held for the purpose of proposing changes to John's IEP (see 20 U.S.C.A. § 1415(b)(1)(C)) or to consider the substantial provisions in the IEP. Furthermore, the Busers recharacterize the cessation of instruction on completed objectives as "dropping" such objectives or changing John's IEPs. On the contrary, determining mastery of specific short-term objectives and moving forward with the unmastered objectives is an essential

part of the instructional process and demonstrates an orderly progression in the implementation of John's IEPs.

SUMMARY OF REASONS TO DENY THE WRIT

1. John's parents were afforded, and they utilized, ample opportunity for meaningful participation in their son's education. No violations of their rights to meaningful participation occurred.

2. John's individualized education programs did not omit short-term objectives; his IEPs contained a multitude of short-term objectives. The inclusion in the IEP of projected dates for completion of the objectives is not an essential element of a short-term objective and is not required.

3. There is no live case or controversy regarding the appropriateness of John's educational program and no complaint of an educational deficiency. Therefore, there is no live dispute about any educational deprivation - the necessary underpinning for the requested equitable relief of "compensatory" job training.

ARGUMENT FOR REASONS TO DENY THE WRIT

1. Meaningful parental participation

Quarterly reviews: John's parents claim that quarterly staff meetings when educators ascertained the extent to which John achieved short term objectives in his IEP and decided to

conclude instruction on those objectives which had been mastered constituted "meetings" contemplated by 300 C.F.R. § 300.343, and can be held only if the parents are notified and provided the opportunity to participate. Although the Busers acknowledge that John's short-term objectives were not changed at the quarterly staff meetings (Pet. p. 17), they state that John's "IEP was reviewed and revised" at the quarterly meetings (Pet. p. 16) and his IEP "was changed by dropping objectives on the basis that they had been achieved."

Neither the regulations nor logic even suggest that educators are required to involve parents in determining when during a school year a student has achieved a short-term objective in his educational program and to move on in a logical sequence with instruction on the remaining unachieved components of a student's program. As correctly noted by the Court of Appeals, "Mastering a short-term objective is not a 'change' under 20 U.S.C.A. § 1415(b)(1)(C), but merely constitutes the completion of a listed objective in the IEP. The successful completion of a short-term objective is a necessary step in the implementation of the IEP if the annual goal is to be achieved." *Buser*, 51 F.3d at 494, n. 5; Pet. App. A-12.

A meeting within the meaning of § 1415(b)(1)(C) and 34 C.F.R. § 300.343 to assess the effectiveness of an IEP, to propose revisions, or to add or delete components is a very different type of meeting than the staff quarterly reviews. Formulation and evaluation of a plan requires parental notification; implementation of a plan in a logical progression does not.

If an ARD meeting were required before a teacher could discontinue instruction on a short term objective despite the student's mastery of the objective, the entire due process procedure encompassed by 20 U.S.C.A. § 1415 could be invoked to challenge the educator's judgment of mastery for each objective within each goal. Such a procedure would not only interfere with educational judgment in contravention of the directives in *Board of Educ., Etc. v. Rowley*, 458 U.S. 176, 206-08 (1982), and *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1048 (5th Cir. 1989), but would be highly impractical. Considering John's program alone, the potential number of decisions about mastery which could be subject to meetings with parents, administrative review, and judicial review is extremely large.[5]

The ability of the classroom teacher to move the student through the series of short term objectives set forth in the IEP would be seriously compromised, and the educators' professional judgment of mastery would be subject to

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[5] The record shows the following number of objectives identified as means to work toward John's annual goals:

4/25/79 IEP: 14 objectives (Ad.R. 1139-1140)
5/ 1/80 IEP: 19 objectives (Ad.R. 1126-1127)
4/30/81 IEP: 65 objectives (Ad.R. 1119-1121)
5/ 3/82 IEP: 81 objectives (Ad.R. 1098-1107)
2/22/83 IEP: 130 objectives (Ad.R. 949- 960)
5/18/84 IEP: 40 objectives (Ad.R. 1024-1034)
9/ 6/85 IEP: over 32 objectives (Ad.R.1006-1014)
(pages 1006-1008 illegible)

micro-management by administrative hearing officers and judges. There is no legal or logical foundation for Appellant's argument.

Incorporating parental requests in the IEP: John's parents assert denial of a meaningful opportunity for them to have input in their son's education because their written recommendations and written suggestions generally were not included in the IEPs (Pet. p. 5, 20) This is a new argument which was not an issue before the Court of Appeals. Furthermore, the Busers do not point out in their Petition the nature, type, or basis of their written recommendations or suggestions. They assume the existence of an evidentiary presumption, and then attempt to shift the burden of proof by stating that the School District "failed to introduce evidence of one single instance where it had included a request by the Busers in the IEP." (Pet. p. 20)

The Busers point out no regulation or interpretation which guarantees that parents' written suggestions will be included in their child's IEP or that school districts will be held to have denied meaningful parental input unless school districts prove that parents' written suggestions have been incorporated into their children's IEPs.

Method to ascertain consensus: The Busers assert denial of a meaningful opportunity for input based on the practice at the conclusion of ARD Committee meetings when the members of the committee are polled about whether they agree or disagree with the IEP as developed. The Busers assert that, because the other members or the committee voted

first and the Busers voted last, it appeared to them that the school district was "railroading" the decision and that the parents had no effective voice. (Pet. p. 21) The Busers offer no theory on how it would make a difference if they were the first, middle, or last members of the committee to express their agreement or disagreement with the IEP as developed. Moreover, the Busers were well aware of their procedural rights to challenge IEPs, and Mrs. Buser serves as advisor to other parents regarding IDEA procedures. (Ad.R. 58-63, 79-80)

Individualized educational plans are to be developed using a cooperative approach in an effort to reach consensus. The inclusion of statutory procedural safeguards recognizes that consensus may not always be reached. *Burlington School Committee v. Dept. of Educ.*, 471 U.S. 359, 368-69 (1985).

Meetings eventually must be brought to closure either with or without achievement of consensus. To determine if consensus has been reached and to make a record of which members agree and which, if any, disagree with the student's program, polling of the participants is needed. The Busers do not suggest a different method, but merely assert they voted last and therefore felt outvoted and were thus prevented from becoming equal participants because of the voting technique. (Pet. p. 20-21).

The District Court correctly analyzed "equal participation" for parents as the opportunity for "meaningful input" and the "right to seek review of any decisions they think inappropriate," citing *Honig v. Doe*, 484 U.S. 305, 311

(1988). The Court further referred to the Supreme Court's interpretation of parents' role as a "large measure of participation" for parents and guardians. *Board of Education v. Rowley*, 458 U.S. 176, 205 (1982). (R. 12), (Pet. App. C-16)

The Supreme Court additionally addressed the concept of consensus and discussed the extensive procedural safeguards in IDEA as a means to insure the full participation of parents and proper resolution of substantive disagreements if consensus cannot be reached and disputes are not resolved. *Burlington School Committee v. Dept. of Educ.*, 471 U.S. 359, 368-69 (1985).

See also *Doe by Gonzales v. Maher*, 793 F.2d 1470, 1488-90 (9th Cir. 1986), aff'd as modified, *Honig v. Doe*, 484 U.S. 305 (1988). Parents do not have a veto power. *Doe* at 1489. If consensus is not reached, mediation or other efforts to resolve the disagreement may be employed, and/or the due process procedures under 20 U.S.C.A. § 1415 may be invoked.

The Busers failed to prove the existence of error in the ARD Committee voting procedures and failed to prove any impact on John's educational program or services attributable to the voting procedures.

2. Short-term objectives

The Busers allege John's IEPs were "fatally flawed" because the school district allegedly omitted short-term objectives from John's IEPs (Pet. p. i; iii; 22-23). They then acknowledge the inclusion of objectives by stating, "Yes, they contained objectives, but they were not short-term instructional objectives because no short-term was stated in the IEPs." (Pet. p. 23)

The Busers assert the component parts (i.e. short-term objectives) of John's annual goals do not qualify as "short-term objectives" under 20 U.S.C.A. § 1401(a)(20)(B) because the objectives contained in John's IEPs did not spell out the "term;" i.e. the specific time projected for completion of each objective.[6] Despite the Busers' argument of a "clearly expressed Congressional intention that the IEP . . . specify the short term of the 'short-term instructional objectives,'" (Pet. p. 26) there is no language in the statute to support this argument. The district court correctly stated that the IDEA does not require time frames in the IEP. (App. C-27 and C-28).

Although the Busers complain about the school's practice of reviewing John's IEPs quarterly (at least to the extent his parents were not invited prior to the 1984-85 school

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[6] From 1979 through the 1985-1986 school year, John's IEPs contained nearly 400 objectives. See Ad.R. 949-960, 1006-1014, 1024-1034, 1098-1107, 1119-1121, 1126-1127, 1139-1140.

year), they do not complain that quarterly reviews were an inappropriate method to review progress. The District Court was clearly correct in concluding that the quarterly review practice "suggests that the objectives had at least a ninety-day review period, making the objectives shorter in duration than annual goals." (R. 19; Pet. App. C-28)

An excellent analysis of § 1420(a)(20)[7] is set forth in *Doe By and Through Doe v. Defendant I*, 898 F.2d 1186 (6th Cir. 1990), in which the court determined that omission of items specifically required by the statute did not render the student's IEP invalid, and to do so based on "these technical deviations from section 1401(19) . . . is to exalt form over substance." *Id.* at 1190. The Sixth Circuit viewed Rowley's emphasis on procedural safeguards as referring to "the process by which the IEP is produced, rather than the myriad of technical items that must be included in the written document." *Id.*

There is no claim in the Petition that absence of specific time frames in John's IEPs had any negative impact on his educational program. The Busers simply argue that time frames must be set out in an IEP, and request relief in the form of two years of job training for John. The courts below were clearly correct in rejecting the Busers' claim.

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[7] The section was previously identified as § 1401(19).

3. Mootness

This case is moot. There is no live controversy about any issues upon which the requested relief could be based. U.S. Const. Art 3; *Honig v. Doe*, 484 U.S. 305, 317-18 (1988).

The relief sought by the Busers is founded on principles of equity. They argue the case is not moot because the relief requested could be implemented. (Pet. p. 30) They do not base their request for two years of job training for John on some actual or perceived deficiency in the educational services provided to John; rather, they allege procedural violations related to the parents' opportunities for meaningful input and an alleged procedural violation for failure to spell out in John's IEPs the projected ending date for each of the many short-term objectives in his educational program.

Despite *Honig*, some courts of appeal have held that post age 22 compensatory education is an available remedy under § 1415(e)(2). They analogize compensatory education as an equitable method to remedy past deficiencies in educational services to the concept of retroactive reimbursement as an equitable method to remedy parents' incurring costs for private schooling when schools have not offered an appropriate placement. See *Pihl v. Massachusetts Dept. of Educ.*, 9 F.3d 184, 187-90 (1st Cir. 1993), and cases cited therein.

Past deprivation or extreme inadequacy of services is the legal *sina qua non* of post-age 22 compensatory education cases. The equitable foundation for relief is either complete denial of services or such grossly inadequate services or placement that it amounts to very serious deprivation of a student's right to services. This stands in stark contrast to the case before this Court. Where the appeal is based entirely on procedural issues without any claim that the alleged procedural violations deprived John of educational benefits, there is no live issue upon which the requested relief could be founded.

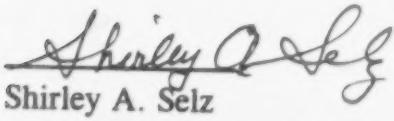
There is no link between the alleged procedural violations and the requested relief. The Busers have not brought forward any claim of an actual deprivation as a base for equitable relief. Therefore, whether or not post-age 22 compensatory education is available under IDEA in cases of total or severe deprivation, it is not available in this case. There is no live controversy about any issue which could support the relief sought regardless of the legal correctness or incorrectness of the Busers' procedural claims. Any ruling on the Busers' issues about parental participation and about specification of time periods in short-term objectives would amount to only an advisory opinion in the circumstances of this case.

CONCLUSION

There are no issues in this case that call for an exercise of this Court's power of supervision. There are no special or important reasons to grant the writ. The Petition

rests on alleged procedural violations, none of which is alleged to have caused John to lose educational benefits. There is no pleading or proof of an equitable basis for the equitable relief requested, thereby making any opinion advisory only. Neither the Court of Appeals nor the District Court departed from the accepted and usual course of judicial proceedings. The Petition should be denied.

Respectfully submitted,



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APPENDIX A

20 U.S.C.A. 1412. Eligibility requirements

In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Secretary that the following conditions are met:

* * *

(2) . . . Each such amended plan shall set forth in detail the policies and procedures which the State will undertake or has undertaken in order to assure that--

(B) a free appropriate public education will be available for all children with disabilities . . . between the ages of three and twenty-one within the State . . .

20 U.S.C.A. § 1415. Procedural Safeguards

* * *

(b) Required procedures; hearing

* * *

(2) Whenever a complaint has been received under paragraph (1) of the subsection, the parents or

guardians shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

APPENDIX B

19 T.A.C. § 89.220. Age Ranges for Student Eligibility.

(a) Pursuant to state and federal law, service provided in accordance with this subchapter shall be available to all eligible students beginning on their third birthday and to all eligible students who have not reached their 22nd birthday on September 1 of the current scholastic year.

19 T.A.C. § 89.221. The Admission Review, and Dismissal (ARD) Committee

(a) Each school district or special education cooperative shall establish at least one admission, review and dismissal (ARD) committee which shall make decisions concerning the educational program of a student referred for consideration for special education services.

(b) The ARD Committee shall perform the following functions for each student considered for special education services:

* * *

(7) develop the individual educational plan;

* * *

(10) review all special education assignments at least annually to determine the need for continuation, change, reappraisal, or termination.

APPENDIX C

Petitioner's Appendix C is a reproduction of the district court's decision except for several typographical errors and the following significant omissions:

1. Page C-9, the first sentence in the last paragraph states, "While contesting the fact that his IEPs even contained short term objectives without notice to his parents."

   The sentence should state,

   "While contesting the fact that his IEPs even contained short-term objectives, plaintiff argues that CCISD eliminated or discontinued short-term objectives without notice to his parents."

2. Page C-12 omits an entire paragraph following the marking for footnote 3.

   The paragraph to be inserted states,

   "This Court is not persuaded that the IEPs were changed without notice to the parents, as the parents, year after year, agreed to the proposed IEPs. The Court reasons that had short-term objectives been improperly eliminated, the parents would have noticed the absence of the short-term objectives at the annual review of the plaintiff's IEP. At that review, the parents could have requested that the eliminated

objectives be reinstated, or could have disagreed with the proposed IEP. The evidence shows that plaintiff's parents approved all IEPs except the one for the last school year and the transition IEP. Plaintiff's evidence fails to support his claim of a per se violation of the IDEA."

3. Page C-17 omits an entire paragraph between ". . . vote" at ARD meetings." and "One of the plaintiff's special education teacher. . .

The paragraph to be inserted states,

"The Court now examines the issues of whether plaintiff's IEPs were calculated to enable plaintiff to receive educational benefits. *Board of Education v. Rowley*, 458 U.S. 176, 206, 102 S. Ct. 3034, 3051 (1982). The evidence is undisputed that plaintiff is autistic, and that plaintiff is severely disabled by his autism. Plaintiff has severe communication/language and perceptual disorders, exhibits bizarre behavior patterns, and has problems with motility. At the onset of his special education, plaintiff's was placed in a self-contained autistic classroom, where he received individualized instruction from his special education teachers and aides."

4. Page C-28, the first sentence of the second paragraph states, "Pat Cox testified that, based upon his review

of plaintiff's IEPs, he could find no prioritization of plaintiff's behavioral objectives was shown by headings and sub-headings."

The text is actually two sentences and should state,

"Pat Cox testified that, based upon his review of plaintiff's IEPs, he could find no prioritization of plaintiff's behavioral objectives. Susan Abbott testified that prioritization of behavioral objectives was shown by headings and sub-headings"